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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 765

WILSON AND CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, BELL SYSTEM ASSOCIATED COMPANIES, AND WESTERN UNION TELEGRAPH COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT THE WESTERN UNION TELEGRAPH COMPANY

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POINT I

No federal question is presented as to the decisional procedure followed by the Federal Communications Commission.

The petitioners object to the dual participation—which is quite customary*—of the F.C.C. Common Carrier

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* Cf. Statement of Newton C. Minow before the Committee on Interstate and Foreign Commerce, House of Representatives, on June 9, 1961 in hearings on H. R. 14, the proposed Independent Regulatory Agencies Act of 1961, especially at pp. 142-143.

Bureau in both the rate hearings and the formulation of the initial and final rate decisions. Such procedure is not contrary to any existing statute. Section 5 of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. § 1004, and Section 409 (c) of the Communications Act, 48 Stat. 1096 (as amended July 16, 1952, 66 Stat. 721), 47 U.S.C. § 409 (c), taken together, require separation of staff functions only in adjudicatory rate cases, such as reparation cases commenced by individual complainants for their individual benefit, or other adjudication.

Petitioners appear to rely partly on abstract underlying principles of fairness and procedural due process, realizing fully the broad scope and effect of so doing. (Petition, p. 11, third paragraph.)

In this generalized part of their argument they in substance assert supposed rights of the communications carriers, which the carriers have never themselves deemed infringed. Even if some combination of functions, or some collaboration among FCC employees or members in the formulation of the rate orders, were so improper as to deny procedural due process to someone it would have been the regulated carriers, not the petitioners, to whom the process would have been denied. The petitioners became parties only after the release of the initial decision.

In the first *Morgan* case, 298 U. S. 468, 481 (1936), this Court pointed out that procedural due process in administrative hearings does not preclude practicable aid of assistants. While petitioners refer to the Common Carrier Bureau of the FCC as prosecutors herein, the FCC was not contending that private line rates were too high or too low or otherwise improper. It was only Western Union which had taken a position in that regard. The agency was indeed conducting a rate inquiry, but not at any time advocating any specific result.

The FCC has manifold responsibilities. Television and radio broadcasting are probably the fields of FCC concern best known to the public, but telegraph rate-making is also the FCC's responsibility. It is a highly specialized and complex field. The Common Carrier Bureau is therefore expected to have especial competence in matters arising under Title II of the Communications Act. If not permitted to participate in the formulation of rate decisions, it would lose much of its especial value. Under existing law it may participate therein by the same personnel who took active part in the rate hearings. Arguably, such personnel are the best qualified to participate in formulating the decision. They represent the public interest, in any event. They cannot be partisan in a real sense.

If changes are to be made in the basics, they should be made by Congress, after full hearings. At a Congressional hearing in 1961, FCC Chairman Minow in his statement noted at p. 1, *supra,* explained that staff participation in rate hearings ensures full and adequate inquiry—which the regulated parties, if left to themselves, might not achieve—and that subsequent isolation of the Commission from its staff of experts at the decisional level in rate cases would tend to sterilize and hamper the whole process of rate-making and would require two duplicate common carrier staffs, one to participate in hearings and one to help formulate decisions.

If the second *Morgan* case, 304 U. S. 1 (1938), were relevant, the regulated carriers (not the petitioners) would have had some complaint about lack of opportunity to present their case or arguments fully to the Commission.

They have never voiced any such complaint. It is difficult to see how they could have. They had full opportunity to participate in the hearings, to submit proposed findings and conclusions and briefs in support thereof, to except to the initial decision and support their exceptions by briefs and oral argument, and to answer the exceptions

of others. They made use of all these procedural safeguards.

In the *Morgan* case it was not even contended that the authorship of the administrative order was what rendered it vulnerable (304 U. S. at p. 8).

Moreover, the petitioners, sensitive though they are to procedural requirements, did not mention their present procedural objections in their petition for review filed in the Court of Appeals, but only in their revised brief. The affidavit upon which they now rely forms no part of the statutory record for review as specified in Section 7 (a) of the Judicial Review Act, 64 Stat. 1130, 5 U.S.C. § 1037 (a), quoted below. Their late discovery of how communications rate decisions are formulated apparently came too late to enable their present objection to be properly raised below. The aforementioned statute provides:

> "Petitions to review . . . shall be heard in the court of appeals upon the record of the pleadings, evidence adduced, and proceedings before the agency . . ."

An affidavit (Petition, App. D., p. 44) filed by an FCC employee in the Court of Appeals does not answer the statutory description. Arguably, the Court of Appeals had no authority to receive it or to consider it as if it were part of the agency record.

POINT II

No federal question is presented as to the notice given by the Federal Communications Commission.

Under Section 4 (a) of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. § 1003 (a), quoted below, no Federal Register notice was required by law to be published. The telephone companies and the telegraph company were otherwise cognizant of the institution and scope

of the formal investigation of private line rates. The publications made were accordingly optional, rather than essential to the validity of the rate orders eventually made.

The statute provides:

> (a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law). . . .

It is not disputed that the communications carriers, who were the only parties to the proceeding subject to the regulatory jurisdiction of the FCC, were named in and served with the instituting order (Petitioners' Appendix, Vol. I., p. 343). They attended a prehearing conference. Assuredly, they did not depend upon the Federal Register (20 F. R. 8128, 8342; 21 F. R. 1614, 6961, 7810; 22 F. R. 6663, etc.) to make them aware of the rate investigation.

The petitioners doubtless interpret the statutory words "all persons subject thereto" as including rate payers, who are "subject" to a rate order only indirectly, since it establishes a rate which the carrier must necessarily charge for the service. That construction is strained and unrealistic, and would render meaningless the parenthetical exception in the quoted statutory language.

Nor is it readily apparent even upon abstract principle why, let us say, every customer of the Bell Telephone network should receive notice of every proposed rate prescription as a condition to its legal validity. The overwhelming numerical majority of such customers are neither equipped, financially or otherwise, to take part in a rate case, or in any degree interested in so doing.

It is different when the direct coercive effect of proposed rule-making would be felt by members of the public. Then,

the affected public is entitled to advance notice. *Hotch* v. *U. S.*, 212 F. 2d 280 (9 Cir. 1954).

The notice point was not urged by the petitioners before the FCC. Although they intervened for the purpose of excepting to the initial decision, argued their exceptions orally, and sought rehearing and reconsideration of the final FCC order, they did not raise the notice point until they filed their petition for judicial review. Then, it was too late. *U. S.* v. *Tucker Truck Lines*, 344 U. S. 33 (1952); *U. S.* v. *Hansson, Inc.*, 296 F. 2d 779 (Pat. App. 1960), *cert. den.* 368 U. S. 899.

Finally, the notice was not defective in any event. Petitioners merely argue that it was too broad, not that it failed to cover the ground.

The petitioners seem to believe that the established mechanics for excepting to an FCC initial decision and seeking rehearing or reconsideration of a final order are legally insufficient, and that there must also be engrafted or superimposed some further procedure involving notice of the proposed terms of the initial decision, to be given prior to its release. Presumably they believe exceptions thereto should also be permitted. In effect, they would object to an initial decision before its issuance rather than after.

Even if the Commission were to adopt such novel procedure, it would serve no purpose. A proposed initial decision could not be promulgated until after the close of the hearings. It could not be formulated before all evidence had been taken. But once the hearings have ended, there is no need to add another step to the decision-making process. Exceptions to the initial decision may be filed, and petitioners filed theirs. Oral argument may be requested, and petitioners argued. Upon the coming down of the final decision, reconsideration may be sought, and petitioners sought it. Due process at the agency level

hardly requires any further gradation in the scheme of rule-making. Nor has Congress provided for it.

It may be added, parenthetically, that neither the telegraph company nor (so far as it knows) the telephone companies sought the prescription that private line telegraph service be offered exclusively on a 24-hour, 7-day basis. Unlike the petitioners, Western Union recognizes that the Commission acted lawfully, in no wise exceeding its statutory powers, in making the directions it made. Moreover, the communications carriers recognize, as they must, that the Commission was not bound to announce in advance what rate prescriptions it would make in the initial decision. It is clear, in any event, that the presence of an unanticipated determination, the potentiality of which existed *ab initio,* is not a valid objection. *U. S.* v. *Pierce Auto Freight Lines,* 327 U. S. 515 (1946).

POINT III

The determination below is not in conflict with another determination.

The two *Morgan* cases have been discussed under Point I.

There was present here no "Sangamon situation," in which persons outside the agency seek to influence, *ex parte,* the outcome of a contest for a valuable privilege.

Contrary to the Petition (p. 15), no conflict exists with the decision of the Court of Appeals for the Fifth Circuit in *Hill* v. *FPC,* 335 F. 2d 355 (1964). As stated by Judge Brown, the question in that case was whether the Federal Power Commission could lawfully establish standards of proof to be met by a utility in a rate case, for the first time, in the very decision holding that such standards had not been met. An attempt was clearly made by the Power Commission to lay down regulatory rules of substance, retroactively.

The criterion of cost justification to support different charges for like communications service was not established by the FCC for the first time in this matter. It is a standard of communications rate-making well known in the industry (Cf. Petitioners' Appendix, Vol. I, p. 132). No element of surprise, nor any hint of retroactivity, was involved in the Commission's adherence thereto in this matter.

The rationale of the *Hill* decision is that the utility should be given a procedural opportunity to meet its burden of proof regarding its rate base (335 F. 2d at p. 363). As the court there pointed out, in more traditional rate inquiries such as the one involved here, "the criteria will have long been established . . .". The *Hill* court was recognizing that natural gas producer regulation is largely *sui generis*. This is, by now, a well-known fact. The two-step hearing procedure referred to in the Petition (p. 17) was suggested by that court as a possible means of coping with the "undulating" regulatory problem just mentioned.

The petitioners do not relish the fact that a long-standing rate pattern, advantageous to them, was upset. That is understandable. Their effort to demonstrate that they enjoyed some type of vested property right in the old rate pattern is not.

Their reliance upon the due process clause of the Fifth Amendment is not merely misplaced, but is also significantly indicative of their misunderstanding of the regulatory principle involved. The Commission clearly did no more than to prescribe that private line telegraph users should be charged the full costs of the service they use. The Petition (p. 4) characterizes this FCC action as compelling patrons to pay for service they do not want. It compels them only to pay an adequate, rather than an inadequate, rate for the service they do want.

In *Hill* a utility was not told what it must prove to satisfy the Power Commission that its proposed rate increase

was justified. The court there held that it had not been afforded a fair and adequate hearing in regard to the proposed rate. Herein, full and general proof was made by the utilities over a period of years, on the basis of which the FCC determined, *inter alia,* that rates lower than full-time rates, for less than full-time service, were discriminatory. Although charges were lower and hours of service were shorter, the costs were found not different from those of full-time service. The Commission therefore ordered that only full-time private line telegraph service be offered to the public in future. The petitioners thereupon intervened, filed and argued exceptions, sought rehearing, reviewed the order in the Court of Appeals, and now seek further review here. In all these proceedings, their essential quarrel has been with the Commission's regulatory judgment. They have sought, but in vain, to express it in terms of the Commission's power.

Conclusion

If the Court of Appeals strayed in any direction, it was in the direction of over-indulging the petitioners. They obtained drastic injunctive relief pending the determination of their petition for review, to the damage of Western Union. Private line telephone users were also damaged, as indicated by the Government when this matter was last here (October Term, 1963, No. 711). Petitioners were permitted to withdraw their brief on the merits and write a new one dealing with the issue of Common Carrier Bureau functions—thus protracting the review proceeding and the life of the injunction.

The petitioners depend upon essentially hollow arguments. They also ask too much of this Court, seeking to have it step into the shoes of the Congress and dictate sweeping revisions in standards of procedure for rate cases handled by the principal regulatory agencies.

The Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit presents no persuasive reason for the exercise of this Court's discretionary jurisdiction; indeed no federal question is revealed. The petition should be denied.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–41) is reported at 335 F. 2d 788. The final decision of the Federal Communications Commission (A. 269–311) [1] and its memorandum opinion denying reconsideration (A. 313–323) are reported at 34 F.C.C. 217 and 1094.

[1] In accordance with the abbreviation used in the petition (p. 2, n. 1), "A." refers to the printed appendix filed by petitioners in the court of appeals. "J.A." refers to the printed appendix jointly filed below by the government and AT&T.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1964 (Pet. 42), and the petition for a writ of certiorari was filed on December 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner ratepayers were denied the procedural safeguards of the Fifth Amendment when members of the Commission's staff who had appeared as counsel of record in a ratemaking hearing participated in the decisional process leading to the prescription of rates.

2. Whether the Federal Communications Commission gave adequate notice of the subject matter of the ratemaking proceeding under Section 4(a) of the Administrative Procedure Act.

STATUTES INVOLVED

Section 4(a) of the Administrative Procedure Act, 5 U.S.C. 1003(a), and Section 205(a) of the Communications Act of 1934, 48 Stat. 1072, 47 U.S.C. 205(a), are set forth in the petition, pp. 19–20.

STATEMENT

This case concerns a January 1963 decision of the Federal Communications Commission which concluded an eight-year ratemaking proceeding involving the private-line telephone and telegraph services of American Telephone and Telegraph Company and associated companies ("AT&T") and the private-line telegraph services of Western Union Telegraph Com-

pany ("Western Union").[2] The Commission, on the whole, increased the rates for telegraph services and reduced the rates for telephone services, and the Seventh Circuit affirmed. Petitioners are meatpacking concerns which challenged the Commission's decision insofar as it established telegraph rate increases (A. 339).

The pertinent background is as follows:

On March 9, 1956, the Commission instituted a hearing to consider the lawfulness of all private-line tariffs of AT&T and Western Union (A. 341, 343; Sections 201–205 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 201–205, 403). In addition to enumerating each private-line tariff involved, the Commission, after noting that AT&T had been requested to "conduct a study to determine the costs involved in furnishing private line services and channels" (A. 341),[3] listed three issues to be explored in the proceeding: *i.e.*, whether the tariffs involved "unreasonable discrimination" or gave "unreasonable preference or advantage to any person", whether they contained "unjust and unreasonable" charges, and whether the Commission, acting on its own, should prescribe reasonable charges (A. 342–343).

Thereafter, on August 13, 1957, the presiding examiner released an order outlining the procedural

[2] Private-line services consist of the leasing of communications channels for transmissions between specified locations without requiring the carriers to establish connections for each call or message. The primary services are telegraph and telephone. Both AT&T and Western Union provide private-line telegraph services but only AT&T provides private-line telephone services.

[3] Western Union also was later requested to submit a cost study (J.A. 390–391).

steps to be followed and listing the specific matters to be explored in the hearing. Those matters included (A. 354): "The views and conclusions of the respondents [carriers], supported by basic facts, concerning the reasonableness of the over-all rate levels, of specific rates, and of rate relationships * * *", the "[s]pecific rate adjustment proposals indicated by the cost studies * * *", and "[o]ther tariff rate adjustments needed to simplify and clarify existing private line schedules, and to remove therefrom * * * discrepancies that have grown up * * *."

Hearings were held during 1957, 1958 and 1959, and the record was closed on September 16, 1959. In its initial decision (issued July 14, 1961) the Commission concluded that AT&T's telephone rates were unreasonably high and its telegraph rates unreasonably low (A. 103). As part of the telegraph rate revisions, the Commission abolished existing "clock hour" and "minimum period" schedules, under which charges were determined according to the number of hours and the time of day a customer utilized telegraph services. The Commission found that those schedules were unreasonably discriminatory because "[t]here is little, if any, difference in the cost of furnishing service during the day or night" and the "[c]osts of providing continuous service are not substantially greater than for minimum period service" (A. 114–115).[4]

[4] In all its rate revisions the Commission was guided primarily by the carriers' costs of providing service since, in the Commission's view (A. 96), "the cost of providing service constitutes the most reliable criterion available for determining just, reasonable and nondiscriminatory rates."

Up to this time petitioners had made no attempt to participate in the hearings. After release of the initial decision, they filed a petition for leave to intervene and submitted exceptions to the decision (J.A. 1–21). They complained of the proposed increases in telegraph rates, particularly of the abolition of the "clock hour" and "minimum period" schedules, but did not contend that the notice of the proceeding was legally defective. Petitioners were permitted late intervention by the Commission (A. 469–470).

In January 1963, the Commission issued a final decision substantially affirming its initial findings and conclusions, and in May of 1963 petitions for reconsideration were denied. In a decision entered on August 14, 1964, the Seventh Circuit affirmed the Commission's rate prescriptions in all respects.

Addressing itself to the issues presented here, the court ruled (1) that the notice of the proceeding was "as specific as the Commission could have made it at the time" (Pet. 29) and (2) that participation by agency counsel in the ultimate determination of the rates did not violate the Administrative Procedure Act, the Commission's own rules, or constitutional due process (Pet. 31–34).[5]

[5] At the time they filed their petition for review in the court below, petitioners also applied for an interlocutory injunction staying the Commission's telegraph rate orders. The government and AT&T opposed the application, but AT&T also urged that if an injunction were issued it should be made applicable to both telegraph and telephone rates. On September 27, 1963, the court below enjoined, *pendente lite*, the Commission's rate orders "in their entirety." The court refused various requests by the government to condition the injunction so as to provide for eventual restitution to private-line telephone users

ARGUMENT

The decision below is plainly correct and presents no important question of law warranting further review.

1. Petitioners contend (Pet. 8–13) that participation in the decisional process by members of the Commission's staff who also appeared as counsel at the hearings deprived them of a "full opportunity for hearing," guaranteed by the Communications Act (47 U.S.C. 205(a)), and also contravened the Due Process Clause of the Fifth Amendment. Petitioners recognize (Pet. 11–12) that the Administrative Procedure Act does not require staff separation of functions in rulemaking proceedings, and that proceedings—such as the one below—for the determination of future rates are expressly defined as rulemaking in the Act (Section 2(c), 5 U.S.C. 1001(c)).[6]

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who were being deprived of the benefits of the lower telephone rates ordered by the Commission even though review of those rates was not being sought. A petition for a writ of certiorari to review the failure of the court to condition its injunction was denied on March 9, 1964. *United States* v. *Wilson & Co.*, 376 U.S. 944.

In its final decree affirming the Commission's rate orders the court below dissolved the interlocutory injunction, but denied a request that it retain jurisdiction in order to permit the government to submit a restitution proposal. On December 14, 1964, Mr. Justice Clark granted the government a 60-day extension of time within which to file a petition for a writ of certiorari seeking review of that denial.

[6] This Court has consistently treated ratemaking as rulemaking, rather than as adjudication. See, *e.g.*, *United States* v. *Morgan*, 313 U.S. 409; *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U.S. 370; *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R.R.*, 233 U.S. 479. In the Administrative Procedure Act and the Communications Act, Congress followed

Their contention that staff participation in the decisional process is constitutionally offensive rests on a misreading of the two decisions upon which they rely, *Morgan* v. *United States,* 304 U.S. 1, and *Sangamon Valley Television Corp.* v. *United States,* 269 F. 2d 221 (C.A. D.C.).

In *Morgan* v. *United States,* the Court reversed a rate order of the Secretary of Agriculture because the interested parties were not given "a reasonable opportunity to know the claims of the opposing party [the Secretary] and to meet them" (304 U.S. at 18). The Secretary had never clarified his position during the hearings (*id.* at 19), and the first notice the parties received of his "concrete claims" was after the Secretary had finally "accept[ed] and ma[de] as his own the findings which ha[d] been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (*id.* at 22).

The case did not hold that preparation of a decision by counsel who had participated in the hearings was *per se* improper. In fact, following the remand, the Secretary of Agriculture reissued his original final

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that basic dichotomy; the staff separation of functions provisions of those Acts (5 U.S.C. 1004(c); 47 U.S.C. 409(c)) apply only to cases of adjudication. The reason for the dichotomy is that adjudicatory cases are primarily "concerned with the determination of past and present rights and liabilities" and are thus "characterized by an accusatory flavor," while, on the other hand, rulemaking proceedings are "essentially legislative in nature." *Attorney General's Manual on the Administrative Procedure Act*, p. 14 (1947).

decision as an initial or tentative decision, giving the parties an opportunity to file exceptions and to present oral argument on the exceptions, a procedure approved by this Court in *United States* v. *Morgan*, 307 U.S. 183, 187, and again in *United States* v. *Morgan*, 313 U.S. 409, 415–416 (after the taking of new evidence, since several years had passed since the Secretary's first decision).

In the present case, the Commission issued an elaborate initial decision (A. 1–268); and petitioners filed exceptions with a supporting brief and participated in oral argument before the Commission—all prior to the adoption of a final decision. They were thus afforded a fair opportunity to know and meet the Commission's claims, which is all that the *Morgan* cases require.

Sangamon Valley Television Corp. v. *United States* is clearly inapposite. That case "involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege" (269 F. 2d at 224). The court of appeals reversed the Commission's decision on the grounds that it had departed from its own rules and had permitted *ex parte* communications to be made by one of the persons contending for the privilege (see *id.* at 223–224). The case did not involve staff separation of functions. Here, in contrast, the court of appeals found that the Commission had complied with its rules and petitioners do not contend otherwise. Moreover, there has been no suggestion that the Commission's staff, like the maker of the *ex parte* communication in *Sangamon Valley*, had a stake in

the outcome of the proceeding. The holding of that case, therefore, has no relevance here.[7]

2. Petitioners also argue (Pet. 13–17) that the notice of the proceeding, pursuant to Section 4(a) of the Administrative Procedure Act, 5 U.S.C. 1003(a), insufficiently apprised them of the Commission's intention to consider the "clock hour" and "minimum period" provisions of the telegraph tariffs. The court below fully considered the question and found that the Commission's order initiating the proceeding was satisfactory. It held—correctly, we believe—that "[t]he notice was not, as petitioners contend, a statement of issues in general statutory language of legislative delegation of authority. It was as specific as the Commission could have made it at the time" (Pet. 29).

The Commission's notice of hearing of March 9, 1956 (A. 341, 343) adequately described the subjects and issues. It listed each private-line tariff to be considered in the hearings, including the tariffs providing for "clock hour" and "minimum period" rates; stated that AT&T had been requested to "conduct a study to determine the costs involved in furnishing private line services and channels"; and set forth the

[7] Petitioners did not raise the separation-of-functions point before the Commission. The government argued in the court below that petitioners had had notice that staff members might participate in the Commission's decision, and that by failing to object they waived their right to raise the question on appeal. See *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33. The court rejected this argument and a similar contention as to the notice issue discussed in point 2, *infra* (Pet. 27–28). If certiorari is granted, we reserve the right to renew those arguments in this Court.

issues to be explored in the proceeding. Those issues were whether the tariffs involved (a) "unreasonable discrimination," (b) "unreasonable preference or advantage" or (c) "unjust and unreasonable" charges, and (d) whether the Commission should prescribe its own charges (A. 342–343). Additionally, in an order released at the outset of the hearing, the presiding examiner stated that "[s]pecific rate adjustment proposals indicated by the cost studies * * *" would be explored in the proceeding (A. 354).

The notice and order, therefore, left no doubt that the Commission was prepared to determine whether the carriers' private-line tariffs were justified by their costs of service. Since this was the same basic test applied in the decision, and lack of cost justification was the specific reason for abolishing the "clock hour" and "minimum period" schedules (A. 96, 114–116), there is no substantial question of lack of notice of the issues or of the standard to be applied.[5]

Petitioners may not have realized at the outset that the existing cheaper rates for use of telegraph services part-time and at certain hours of the day could not be justified on a cost basis. But this does not mean that they were not fairly apprised of the issues

[5] *Hill* v. *Federal Power Commission*, 335 F. 2d 355 (C.A. 5), relied upon by petitioners (Pet. 15–17), presents no conflict. There the Fifth Circuit held that, largely because of uncertainties created by prior decisions discarding cost of service as a criterion for gas pricing, it was not clear until the agency's final decision that cost of service was to be the standard in that particular case. Here, in contrast to *Hill*, the Commission made clear in the beginning that its review of the carriers' private-line rates was to focus on their costs.

involved, so that they might present relevant data or argument, which is the function of the notice provisions of the Administrative Procedure Act (see H. Rep. No. 1980, 79th Cong., 2d Sess., 24). The description of the issues contained in the notice had a well-established meaning in rate regulation and sufficiently outlined the scope of the proceeding. See *Tagg Bros.* v. *United States,* 280 U.S. 420, 440; Davis, *Administrative Law Treatise,* §§ 8.04, 8.05; cf. *Hoving Corp. v. Federal Trade Commission,* 290 F. 2d 803, 807 (C.A. 2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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